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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/511,780	02/23/2000	Johannes Baensch	8265-305	3549

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EXAMINER
MADSEN, ROBERT A

ART UNIT	PAPER NUMBER
1761	

DATE MAILED: 09/29/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	09/511,780	BAENSCH ET AL.	
	Examiner	Art Unit	
	Robert Madsen	1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *28 July 2003* .

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *26-30,32-36 and 38-46* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *26-30,32-36 and 38-46* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

11)☐ The proposed drawing correction filed on _____ is: a)☐ approved b)☐ disapproved by the Examiner.

If approved, corrected drawings are required in reply to this Office action.

12)☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

13)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____ .

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

14)☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).

a) ☐ The translation of the foreign language provisional application has been received.

15)☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) _____ .
4) ☐ Interview Summary (PTO-413) Paper No(s). _____ .
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: .

DETAILED ACTION

Continued Examination Under 37 CFR 1.114

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on July 28, 2003 has been entered. Claims 26-30,32-36,38-46.

Claim Rejections - 35 USC § 112

2. The following is a quotation of the first paragraph of 35 U.S.C. 112:

> The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

3. Claim 26 is rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention. Claim 26 recites a water activity range of 0.75 to 0.91, but the specification discloses *two* separate water activity ranges disclosed as in two different embodiments: (1) 0.80 to 0.91 (including 0.86 to 0.91 and 0.87 to 0.91) from the embodiment disclosed on Page 2 (lines13-28) and Page 6(lines 22-31), which may be disposed on a biscuit as disclosed on Page 3, lines 19-23, and (2) 0.75 to 0.88 , which is part of "another embodiment" , disclosed on Page 3, lines 19-25. recites a salt

level of at least 0.01%, which would include an infinite amount of salt, but the specification only provides support for no higher than 0.5%. Thus, a biscuit with a cream based composition having a water activity of 0.80-0.91 has support, but "another embodiment" includes water activity values of 0.75 to 0.88.

4. Claim 35 is rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention. Claim 35 recites a salt level of at least 0.01%, which would include an infinite amount of salt, but the specification only provides support for no higher than 0.5%.

Claim Rejections - 35 USC § 103

5. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

6. Claims 26,28,30,32,33,35,46 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hilhorst, et al. (EP0773722 B1) in view of Schotel (US 5624702) and Gebhardt et al.

7. Regarding claims 26,28,30,32,33,35, and 46,Hilhorst teaches a composition comprising: up to 25% of a sugar (Page 3, lines 39-43), 10-40% fermented dairy (Page 3, lines 46-55), 3.3% and 5% maltodextrin as recited in claim 33 (Examples III and X), aromatics at less than 2% (page 4, lines 14-17), and up to 4% salt as recited in claim

35 (Page 4, lines 18-20) that is spread on bread (Page 4, lines 38-42). Hilhorst et al. teach dairy cream (40% and 45% fat) in an amount such that the total of fermented dairy and dairy cream is up to 40% of the spread (Page 3, line 46 to Page 4, lines 1-12 in light of the examples). Hilhorst et al. further teach the spread may contain 0.5 to 15% protein and be derived from dairy sources (Page 4, lines 25-30). Hilhorst et al. further teach that water can be added separately or included with ingredients such as milk (Page 4, lines 32-37). Additionally, Hilhorst et al. teach the product may be optionally pasteurized to extend shelf life, and also teaches refrigerated storage in wrappers (Page 4, lines 45-52).Hilhorst et al. are silent in teaching a specific level of dairy cream and using a milk derivative, such as skim milk powder as recited in claims 26,30, and 32. Hilhorst et al. are silent in teaching a particular water activity of 0.75-0.91 as recited in claims 26 and 28.

8. With respect to the level of dairy cream selected, Hilhorst et al. teach any fat level may be selected and the flavor may be optimized by adding dairy fat (Page 3, lines 46 to Page 4, line 10). Therefore to select a level of dairy fat from 5-25% derived from cream (with 40% fat) to provide a desired organoleptic quality as recited in claims 26 and 32 would have been an obvious result effective variable of the desired fat level of the product, as well as the desired dairy flavor.

9. With respect to teaching 10-20% of a milk derivative, such as skim milk powder, Hilhorst et al. teach the protein level should be up to 15% of the spread, wherein both protein and fat are both derived from dairy sources. Schotel is relied on as evidence of the conventional “dairy sources” utilized in making water continuous yogurt based

spreads for applying onto a bread layer. Schotel teaches dairy sources include skimmed milk powder , yogurt and cream(Column 2, lines 57-62, Column 4, lines 23-30). Gebhardt et al. are relied on as evidence of the conventional levels of protein in skim milk based yogurt (#139) is 3.96%, whole milk yogurt(#138) is 3.52%, cream(#92) with 40% fat has traces of protein, and skim milk (#127)has 35.3% protein. Given that Hilhorst et al. limits the amount of yogurt plus cream to 40%, one could combine 10% cream (40%) with 30% skim milk yogurt , obtain a 1.2% protein level, and add 20% skim milk powder and obtain 8.2% protein for the product. Therefore, it would have been obvious to modify Hilhorst et al. and supply the dairy protein from skimmed milk powder since Schotel teaches conventional dairy sources do include skimmed milk powder and one would have been substituting one dairy source for another for a water continuous yogurt containing spread. To select any particular level of skimmed milk powder such as 10-20% as recited in claims 26 and 30 would have been an obvious result effective variable of the particular levels of the other "dairy sources " in the spread since Hilhorst et al. teach the dairy ingredients contribute to the 15% protein level and that no more than 40% of the spread can comprise cream and yogurt.

10. With respect to the water activity, since Hilhorst et al. teach a water continuous spread with the recited composition one would expect a similar water activity of 0.75-0.91 as recited in claims 26 and 28.

11. Regarding claim 29, Hilhorst et al. teach the product may comprise any fat level desired , including molten fatty substances, and the flavor may be optimized by adding dairy fat (Page 3, lines 46 to Page 4, line 10). Therefore, to add any level of molten

fatty substances from 10-25% would have been an obvious result effective variable of the desired fat level and dairy flavor since Hilhorst et al. teach any particular fat level may be selected and the fat may be from both dairy and molten fatty sources, wherein the particular level selected depends on the desired dairy flavor.

12. Regarding claim 46, Hilhorst et al. teach spreading the cream composition onto bread, once it was known to apply the product to "bread" , to select any specific type of bread would have been an obvious matter of choice.

13. Claims 26,28-30,32,33,35,46 are rejected under 35 U.S.C. 103(a) as being unpatentable over Schotel (US 5624702) evidenced by Gebhardt et al.

14. Regarding claim 26,28,30,32, 33,and 35, Schotel teaches a composition comprising: up to 15% of a sugar (Column 2, lines 10-56), 10-40% fermented dairy (Column 3, lines 38-55), 5% maltodextrin as recited in claim 33 (Column 1, lines 1-21 in light of Example2), aromatics at less than 10% (Column 4, lines 8-10, 35-37), and up to 0.4% salt as recited in claim 35 (Column 4, lines 10-11) that is spread on bread (Column 4, lines 47-51). Schotel teaches dairy cream (40% and 45% fat) in an amount such that the total of fermented dairy and dairy cream is up to 40% of the spread and the total fat content is at less than 7% (Column 3, lines 48-51, Column 3, lines 21-28 in light of Example 2). Schotel further teaches the spread may contain 0.5 to 15% protein and be derived from dairy sources (Column 4, lines 23-30). Schotel teaches dairy sources, in reference to obtaining lactose for the formulation, include skimmed milk powder (Column 2, lines 57-62). Schotel also teaches that water can be added

separately or included with ingredients such as milk (Column 4,lines 37-44). Additionally, Schotel teaches the product may be optionally pasteurized to extend shelf life, and also teaches refrigerated storage in wrappers (Column 4, lines 57-67).

15. Although Schotel is silent in explicitly teaching 5-25% dairy cream or 15-20% skim milk powder, as recited in claims 26,30, and 32, to select any particular level of either would have been an obvious result effective variable of the fat and protein content of the fermented dairy product selected since (1) the protein and fat content have upper limits of 15% and 7%, respectively, (2)the dairy cream plus the fermented dairy cannot exceed 40% and (3) skim milk powder can be added to contribute protein. For example, as evidenced by Gebhardt et al on Page 18 , skim milk based yogurt (# 139) has 3.96% protein and traces of fat, whereas whole milk based yogurt (# 138) has 3.52% protein and 3.08% fat, and cream with 40% fat (#92 heavy whipping cream has 40% fat) has traces of protein. Thus, one could combine 10% cream (40% fat) with 30% skim milk yogurt to obtain a 4% fat and 1.2% protein level in the spread and include 20% skim milk powder , as evidenced by Gebhardt et al (# 127) has 35.3% protein and traces of fat, to provide a protein level of 8.2% protein and 4% fat.

16. Although Schotel is silent in teaching a particular water activity, since Schotel teaches the recited composition one would expect a similar water activity of 0.75-0.91 as recited in claims 26 and 28.

17. Regarding claim 46, Schotel teaches spreading the cream composition onto bread, once it was known to apply the product to “bread” , to select any specific type of bread would have been an obvious matter of choice.

18. Claims 27 and 44 are rejected under 35 U.S.C. 103(a) as being unpatentable over Schotel (US 5624702) evidenced by Gebhardt et al. as applied to claims 26,28,30,32,33,35, and 46 above, evidenced by further in view of Tamime et al. , Saintain (US 5573793) and Lauro (EP 0666031A2).

19. Regarding claim 27, As discussed above in the rejection of claim 26, Schotel teaches adding 10-40% yogurt, which is known in the art to have greater than 200 x 10^6 of two types of active cultures (as evidenced by Tamime et al. page 393), and that pasteurizing is *optional* to extend the shelf life, which would kill any living organisms.

20. Saintain is relied on as evidence of the conventionality of providing a water in oil type spread comprising a similar amount of yogurt with live bacteria and the desirability of maintaining the live bacteria to make product claims of health benefits(Column 1, lines 30-67, Column 3, lines 47-56.)

21. Lauro is relied on as further evidence of the desirability of maintaining live cultures (at 10^7 to 10^{11} per gram) in a fermented dairy product spread to a high nutritional contribution (Abstract, Page 2, lines 1-32, Page -3, lines 14-15, Example).

22. Therefore to maintain between 10^4 to 10^{11} per gram of active cultures in the composition of Schotel would have been an obvious result effective variable of (1) whether one pasteurized the mixture to further extend the shelf life and (2) if the high nutritional contribution provided by the active cultures is desired, since Schotel teaches pasteurizing is optional and would kill the microorganism present in yogurt, and 10^7 to 10^{11} per gram of active cultures provide a nutritional contribution.

23. Regarding claim 44, although Schotel teaches refrigerating a yogurt containing spread, Schotel is silent in teaching any number of bacteria after being chilled for 45 days. Lauro teaches a spread with yogurt *adding* living bacteria at a concentration of 10^9 per gram of spread at filling so that a 10^6 per gram product is achieved and after four months has 8 x10^5 per gram remaining in the composition (Abstract, Page 2, lines 1-32, Page -3, lines 14-15, Example).

24. Therefore It would have been obvious that in starting with a yogurt based spread (i.e. 10-40% of the spread comprising greater than 200 x 10^6 active cultures per gram, or up to 8 x 10^7 total in the spread) one would have 10^6 per gram after 45 days of storage, since Lauro teaches a filling that begins with a concentration of 10^6 per gram results in 8 x10^5 per gram after four months (120 days) . One would expect that after 45 days, starting with 10 times as many cultures as Lauro, at least 10^6 per gram would remain.

25. Claims 34,36,39-41 are rejected under 35 U.S.C. 103(a) as being unpatentable over Schotel (US 5624702) evidenced by Gebhardt et al. as applied to claims 26,28,30,32,33,35, and 46 above, further in view of Saintain (US 5573793).

26. Regarding claims 34,39-41, Schotel teaches the spread/cream composition can be a flavored, sweet, or vegetable spread, and may include small particles, up to 10% as recited in claim 40,of herbs or vegetables, but Schotel is silent in teaching pieces of fruits as recited in claims 39 and 41 or nuts as recited in claim 34.

27. Saintain is relied on as evidence of the conventionality of yogurt containing water-continuous spreads used in *sweet* applications may comprise candied fruits or fruit syrups as recited in claims 34,39, and 41 (Column 3, lines 58-65). Therefore, it would have been obvious to include candied fruits or fruit syrups as recited in claims 394,39, and 41 since Schotel teaches the water continuous yogurt containing spread may be used in sweet applications and Saintain teaches water continuous yogurt containing spreads in sweet applications may comprise candied fruits or fruit syrups.

28. Regarding claim 36, Schotel is silent in teaching aerating the cream. However, Saintain who also teaches a yogurt based water continuous product, is relied on as evidence of the conventionality of aerating a yogurt filling at a percentage overrun of 30% to higher than 200% to enhance freshness and melting characteristics (Abstract, Column 3, lines 10-13). Therefore, it would have been obvious to aerate the filling of Schotel since this is known to enhance yogurt based product freshness and melting characteristics.

29. Claim 45 is rejected under 35 U.S.C. 103(a) as being unpatentable over Schotel (US 5624702) evidenced by Gebhardt et al. as applied to claims 26,28,30,32,33,35, and 46 above, further in view of Saintain (US 5573793) and Kingham et al. (US 4721622).

30. As discussed above in the rejection of claim 26, Schotel teaches the composition can be contained within a wrapper. Saintain is relied on as evidence of the conventionality of storing a yogurt based water continuous composition either with or without the intended bakery product, such as in a tubular package (Abstract, 4, lines 20-

30). Kingham et al. also teach yogurt and fermented dairy based creams applied to bread and teach the product including the cream should be contained within a hermetically sealed wrapper to extend the shelf life (Column 5, lines 3-52). Therefore, it would have been obvious to place either the cream composition or bread and cream of Schotel in an hermetically sealed sachet since (1) it was well known to package such a cream with or without the bread and (2) hermetically sealed wrappers provide extended shelf life for yogurt or fermented dairy creams.

31. Claims 38 and 42 are rejected under 35 U.S.C. 103(a) as being unpatentable over Schotel (US 5624702) evidenced by Gebhardt et al.

32. Regarding claims 38 and 42, Schotel teaches a composition comprising: up to 15% of a sugar (2, lines 10-56), 10-40% fermented dairy (Column 3, lines 38-55), 5% maltodextrin (Column 1, lines 1-21 in light of Example2), aromatics at less than 10% (Column 4, lines 8-10, 35-37), and up to 0.4% salt (Column 4, lines 10-11) that is spread on bread (Column 4, lines 47-51). Schotel teaches dairy cream (40% and 45% fat) in an amount such that the total of fermented dairy and dairy cream is up to 40% of the spread and the total fat content is at less than 7% (Column 3, lines 48-51, Column 3, lines 21-28 in light of Example 2). Schotel further teaches the spread may contain 0.5 to 15% protein and be derived from dairy sources (Column 4, lines 23-30). Schotel teaches dairy sources, in reference to obtaining lactose for the formulation, include skimmed milk powder (Column 2, lines 57-62). Schotel also teaches that water can be added separately or included with ingredients such as milk (Column 4,lines 37-44).

Additionally, Schotel teach the product may be optionally pasteurized to extend shelf life, and also teaches refrigerated storage in wrappers (Column 4, lines 57-67).

33. Although Schotel is silent in explicitly teaching 5-25% dairy cream or 15-20% skim milk powder, as recited in claim 38, to select any particular level of either would have been an obvious result effective variable of the fat and protein content of the fermented dairy product selected since (1) the protein and fat content have upper limits of 15% and 7%, respectively, (2) the dairy cream plus the fermented dairy cannot exceed 40% and (3) skim milk powder can be added to contribute protein. For example, as evidenced by Gebhardt et al on Page 18, skimmed milk based yogurt (# 139) has 3.96% protein and traces of fat, whereas whole milk based yogurt (# 138) has 3.52% protein and 3.08% fat, and cream with 40% fat (#92 heavy whipping cream has 40% fat) has traces of protein. Thus, one could combine 10% cream (40% fat) with 30% skim milk yogurt to obtain a 4% fat and 1.2% protein level in the spread and include 20% skim milk powder, as evidenced by Gebhardt et al (# 127) has 35.3% protein and traces of fat, to provide a protein level of 8.2% protein and 4% fat.

34. Although Schotel is silent in teaching a particular water activity, since Schotel teaches the recited composition one would expect a similar water activity of 0.86-0.91 as recited in claims 38 and 42.

35. Although Schotel is silent in teaching the composition must be maintained under refrigeration to provide a shelf life of at least 45 days, Schotel does teach refrigerating the composition and pasteurizing to further extend the shelf life. However, since

Schotel does teach refrigerating and the recited composition, Schotel must also have the same shelf life of at least 45 days.

36. Claim 43 is rejected under 35 U.S.C. 103(a) as being unpatentable over Schotel (US 5624702) evidenced by Gebhardt et al., as applied to claims 38 and 42 above, further in view of Saintain (US 5573793).

37. Schotel is silent in teaching aerating the cream. However, Saintain who also teaches a yogurt based water continuous product, is relied on as evidence of the conventionality of aerating a yogurt filling at a percentage overrun of 30% to higher than 200% to enhance freshness and melting characteristics (Abstract, Column 3, lines 10-13). Therefore, it would have been obvious to aerate the filling of Schotel since this is known to enhance yogurt based product freshness and melting characteristics. Furthermore, to add any particular volume of inert gas any particular weight of cream would have been an obvious results variable of the volume of cream that is to be aerated.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Robert Madsen whose telephone number is (703)305-0068. The examiner can normally be reached on 7:00AM-3:30PM M-F.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (703)308-3959. The fax phone number for the organization where this application or proceeding is assigned is (703) 872-9306.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-0061.

Robert Madsen
Examiner
Art Unit 1761

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